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No. 551

In the Supreme Court of the United States

October Term, 1947.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of PETITIONER.

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BRIEF *of* PETITIONER.

To the Honorable, The Supreme Court of the United States:

Your petitioner, Virgil T. Brinegar, respectfully shows:

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is now officially reported: *Brinegar* v. *United States,* 165 F. 2d 512; HUXMAN, J., dissenting. It appears in the Record. (R. 36-41) The dissenting opinion of HUXMAN, J., also appears in the record. (R. 41-47)

No formal opinion was written by the trial judge. The *per curiam* decision of SAVAGE, J., appears in the record: "Colloquy between court and counsel" (R. 12-14) and "Denial of motion to suppress." (R. 14) Judgment and sentence of the District Court is to be found at R. 4.

II.

Jurisdiction.

1. The writ of *certiorari* was applied for under Rule 38 of this court and jurisdiction was invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, U. S. C., Sec. 347(a) and is the proper remedy.

—*Ex parte Lau Ow Bew*, 141 U. S. 583.

2. The opinion of the Circuit Court of Appeals for the Tenth Circuit was filed on December 10, 1947. (R. 36) Upon order for extension of time duly had (R. 45) petition for rehearing was filed and denied January 2, 1948. (R. 47) The opinion of the Court was entered the same day.

3. Petition for writ of certiorari was timely filed in this Court on January 27, 1948, and writ was by the court granted on March 8, 1948. (R. 49) (... U. S. ..., 68 S. Ct. 662, 92 L. ed 577).

III.

Statement of the Case.

1.

PROCEEDINGS IN TRIAL COURT.

On March 5, 1947, an Information was filed in the United States District Court for the Northern District of Oklahoma (Criminal, No. 11,207) charging petitioner, Virgil T. Brinegar, with violation of the Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223, a misdemeanor. (R. 1-2) On May 5, 1947, petitioner duly filed his motion to suppress the evidence on the ground that it was obtained as a result of an unlawful arrest, and unlawful search and seizure, without a warrant, and in violation of the Fourth Amendment to the Constitution. (R. 2) Upon hearing duly

had the court overruled the motion to suppress on May 9, 1947. (R. 2-3, 14)

Thereupon, on arraignment, petitioner entered his plea of not guilty, and the cause was tried to a jury which returned a verdict of guilty as charged. (R. 3) On May 16, 1947, the court pronounced judgment and sentence of thirty days' imprisonment and to pay a fine of $100.00. (R. 4)

2.

THE FACTS.

The facts adduced in evidence were briefly the following:

On March 3, 1947, petitioner was driving his 1946 Ford Coupe westerly toward Quapaw, Oklahoma. It was about 6:00 o'clock p. m. and petitioner was returning to his home in Vinita, Oklahoma, from Joplin, Missouri. (R. 29, 30) At a point about five miles west of the Missouri line, about a quarter of a mile east of the Quapaw bridge, two Alcohol Tax Unit Investigators, Mr. Malsed and Mr. Creehan, were lying in wait in their car. (R. 8, 10-11, 16, 18) Their car was facing west, but Creehan "looked through the rear vision mirror and saw a car rounding the curve about a mile east" of their position. (R. 10) There was nothing untoward in the presence of a car on the highway, nor in the approach of petitioner's car. "As this car passed" both Malsed and Creehan noted that the car appeared to be "heavily loaded"; but there was no testimony whatsoever that the springs were sagging, or that the back end was down, or similar circumstances (R. 8, 9, 10, 11, 12) and both the trial court and the Circuit Court of Appeals held that the appearance of the car did not constitute probable cause. (R. 9, 12, 38-39) Malsed, who had previously arrested Brinegar on September 30, 1946, recognized peti-

tioner when he passed, informed Creehan, "That is Brinegar," and on the sounding of that "charge" the officers immediately gave chase. (R. 8, 10, 17, 21) Petitioner then increased his speed and after a movie-thriller run of about a mile, over rough, sharp curving, slick and dangerous roads at a speed of sixty miles per hour, the officers opened their siren, crowded petitioner off of the road, into a ditch *and forced him to stop!* (R. 8, 10, 11, 17, 18, 19, 21, 22, 29, 32)

Petitioner first realized that the Federal agents were trying to stop him when "the siren blowed," and upon such realization he stopped as quickly as he could. (R. 31-32) He was forced to stop under the most extreme compulsion: driving, so the Federal agents testified, at a speed of up to sixty miles per hour, they drove along side of petitioner's car, "forced him off of the road," into the ditch and prevented his forward progress by bringing their car to a stop at the side of and to the front of petitioner's car, thereby forming a barricade. (R. 8, 10, 18, 21, 22, 29, 32)

Malsed got out of the right side of the investigator's car, and Creehan jumped from the left side and they both started back to petitioner's car. (R. 8, 17, 19, 23, 24) Malsed said, "Hello Brinegar, how much liquor have you got in the car?" (R. 8, 9, 17, 19) To which Brinegar replied, "Not too much." (R. 7, 8, 9, 17, 19) Simultaneously therewith and while both officers were still approaching petitioner's car, Creehan, who testified that they "make it a point" to get the driver out of his car, so that he can't get away with it, ordered or "requested" Brinegar to get out of his car. (R. 23-24) Brinegar complied. (R. 19, 29)

With the door of the car thus opened the officers testified they were able to see a case of whisky in the front of the car (R. 8-9, 19, 22) and subsequent search revealed some

twelve or thirteen cases of whisky contained and concealed in a compartment under and back of the seat. (R. 9, 19, 23) The record is clear that prior to the stopping of the car the officers could not see any whisky, and had no personal knowledge that Brinegar was in fact transporting any whisky. (R. 22) According to the officers, petitioner was placed "under arrest" after they searched the car and discovered the whisky. That was fully fifteen minutes or more after they had originally stopped the car. According to Officer Malsed the "formal arrest" was then made by advising petitioner that, "We are taking you in." (R. 9, 20, 21) Creehan was of the opinion that no formal arrest was ever made; petitioner being merely advised, "Well, you get in the car, come along with us." (R. 22) Brinegar, the car and the whisky were all taken into custody on the spot. (R. 20, 22)

The Federal Investigators admittedly had no warrant for the arrest of petitioner, had no search warrant for the search and seizure, and, of course, served no warrant upon petitioner. (R. 7, 10, 11)

3.

APPEAL.

On appeal the United States Circuit Court of Appeals for the Tenth Circuit, (PHILLIPS, HUXMAN, and MURRAH, Circuit Judges, sitting) affirmed the judgment and sentence of the trial court in a 2 to 1 decision. The court in an opinion by PHILLIPS, J., held (R. 36-41):

> First. That the facts within the knowledge of the investigators prior to the time the incriminating statements were made, were not sufficient as basis for and *did not constitute probable cause for a search.*
>
> Second. That said facts were insufficient to pro-

vide the basis for and *did not constitute probable cause for the arrest of petitioner without a warrant.*

Third. That under the facts in evidence whether Brinegar was arrested "may be doubted," but that it was *unnecessary to decide* this question.

Fourth. That under the circumstances disclosed by the record the statements made by petitioner were not coerced by the action of the officers, but were voluntarily made.

Fifth. That the search was commenced and made *after* the pursuit, the interrogation and the admissions obtained.

Sixth. That notwithstanding the absence of probable cause for search or arrest at the inception of pursuit, the subsequent voluntary admission of petitioner, made after being unlawfully stopped upon suspicion only and interrogated with respect to whisky, *could relate back and be added to the insufficient information previously had* by the investigators so as to constitute probable cause for the search and seizure.

Seventh. That the statements and evidence obtained while officers were engaged in conducting a search without probable cause are admissible in evidence on the trial of the defendant.

The error of the court was excised by the well-reasoned dissenting opinion of HUXMAN, J., who lays it down (R. 41-44):

First. That the search began and was continuing from the commencement of the pursuit of petitioner by the Federal officers. That the pursuit was undertaken upon suspicion only and solely for the purpose of searching petitioner's car for the discovery of evidence of violation of law.

Second. That under the facts in evidence there was *clearly no probable cause* warranting the search,

the seizure or the arrest of petitioner without a warrant.

Third. That the acts of the officers in pursuing the car, forcing it to the ditch, compelling it to stop, making further progress impossible and interrogating the driver *constituted a search.*

Fourth. That the admission upon which the Government relies was obtained while the Federal agents were engaged in an illegal search of petitioner's car in violation of the Fourth Amendment.

Fifth. That an admission against interest or other evidence obtained while Federal agents are engaged in conducting an illegal search in violation of the Fourth Amendment is inadmissible in evidence.

IV.

Specification of Errors.

First. The Circuit Court of Appeals erred in holding that a search and seizure, without a search warrant, commenced by Federal agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to the unlawful pursuit and forcible stopping or arrest, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation or the force and compulsion inherent in the attending circumstances.

Second. The Circuit Court of Appeals erred in holding that the acts of the A. T. U. agents—in pursuing an automobile lawfully on the highway, in compelling the driver to stop his car by forcing him off the road, in placing him under restraint or arrest and making his further forward progress impossible, and in interrogating the driver, all without probable cause or the commission of any offense in the agents' presence, for the purpose of ascertaining the existence of a violation of law—did not constitute a search.

Third. The Circuit Court of Appeals erred in holding the determination of the existence or validity of an arrest without a warrant for violation of the Liquor Enforcement Act of 1936, (27 U. S. C. 223) within the State of Oklahoma is a matter of general Federal law in the absence of an applicable Federal statute.

Fourth. The Circuit Court of Appeals erred in holding that a "voluntary" statement obtained while Federal agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

Fifth. The Circuit Court of Appeals erred in permitting the Federal Alcohol Tax Unit Agents, arbitrarily, without warrant, without justification and without probable cause, to pursue and forcibly stop, at random, any citizen upon the public highways, and to subject the citizen to such inconvenience and indignity, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution.

V.

Points and Authorities.

1.

The acts of the Alcohol Tax Unit Agents in pursuing petitioner's car, in compelling him to stop by forcing his car off the highway, in placing petitioner under restraint or arrest, making his further progress impossible, and in interrogating him, all without probable cause or the commission of any offense in the presence of the officers, for

the purpose of ascertaining the existence of a violation of law, constituted a search.

—*Nueslein* v. *District of Columbia,* (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Hanley,* (D. C. N. Y.) 50 F. 2d 465;
Johnson v. *United States,* (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323;
Edwards v. *State,* (Okl. Cr.) 177 P. 2d 143;
Black v. *State,* 63 Okl. Cr. 317, 74 P. 2d 1172;
Hoppes v. *State,* 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State,* 71 Okl. Cr. 239, 110 P. 2d 621.

2.

The determination of the existence or validity of an arrest without a warrant for violation of the Liquor Enforcement Act of 1936 (27 U. S. C. 223) within the State of Oklahoma is controlled by the law of the State of Oklahoma.

—*United States* v. *Di Re,* (No. 61, October Term, 1947, decided January 5, 1948) 332 U. S. 581, 68 S. Ct. 222, 92 L. ed. 218;
Johnson v. *United States,* (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

3.

Under the law of Oklahoma a citizen's car may not be stopped on mere suspicion and his car searched in order to procure evidence against him. A search or arrest without a warrant can be valid only if for an offense committed in the presence of the arresting officer or for a felony of which the officer had reasonable cause to believe defendant guilty.

—*Hoppes* v. *State,* 70 Okl. Cr. 179, 105 P. 2d 433;
Ingraham v. *State,* 48 Okl. Cr. 178, 290 P. 344;
Graham v. *State,* (Okl. Cr.) 184 P. 2d 984;

Childress v. *State*, 31 Okl. Cr. 208, 238 P. 218;
Leary v. *State*, (Okl. Cr.) 67 P. 2d 972;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
Keith v. *State*, 30 Okl. Cr. 168, 235 P. 631;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Ketcham v. *State*, 63 Okl. Cr. 428, 75 P. 2d 1159;
Tucker v. *State*, 62 Okl. Cr. 406, 71 P. 2d 1092;
Bowdry v. *State*, 64 Okl. Cr. 86, 77 P. 2d 753;
Black v. *State*, 63 Okl. Cr. 317, 74 P. 2d 1172.

The fact that defendant was conveying liquor, not being discoverable without a search, the offense of conveying was not committed in the presence of the officers.

—*Sowards* v. *State*, 27 Okl. Cr. 431, 259 P. 157;
Leary v. *State*, (Okl. Cr.) 67 P. 2d 972;
and cases cited *supra*.

4.

Under the Oklahoma law where officers pursue an automobile on the highway and sound their siren as a result of which the driver stops his car and submits to the restraint of the officers, an arrest is then and there consummated.

Under the Oklahoma law where officers pursue an automobile lawfully on the highway, compel the driver to stop his car by forcing him off the road, place him in restraint and prevent the further forward progress of his car an arrest is then and there consummated.

Under the Oklahoma law where such an arrest without warrant is made without probable cause or the commission of an offense in the officer's presence the arrest is unlawful and a search incident thereto is unreasonable and illegal.

Under the Oklahoma law where the officer becomes aware of the facts constituting the offense *after* making

an unlawful arrest, the arrest cannot be justified as being for an offense committed in his presence.

Under the Oklahoma law if the arrest by the officer is unlawful voluntary statements or admissions, if any, made by the defendant following such unlawful arrest, are incompetent and inadmissible on a motion to suppress the evidence

Under the Oklahoma law the search commences with the pursuit and the illegal search and pursuit cannot be legalized by any subsequent admission, waiver, commission of offense or the discovery of the contraband.

—*Hoppes* v. *State*, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
Bohannon v. *State*, 66 Okl. Cr. 190, 90 P. 2d 675;
Hammer v. *State*, 44 Okl. Cr. 249, 280 P. 475;
Ingraham v. *State*, 48 Okl. Cr. 178, 290 P. 344;
22 Okl. St. Ann., Sec. 186;
22 Okl. St. Ann., Sec. 190;
22 Okl. St. Ann., Sec. 196.

5.

Under the Fourth Amendment it is imperative that a search and seizure without warrant be made upon "probable cause" then existing or it is unreasonable and unlawfully made.

—*Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Pearson v. *United States*, (C. C. A. 10) 150 F. 2d 219;
Johnson v. *United States*, (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 2 L. ed. 323;
United States v. *One 1937 Model Studebaker Sedan*, (C. C. A. 10) 96 F. 2d 104.

6.

In establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile attempted to be searched—the officer is limited to the facts and circumstances within his knowledge with which he initiates the search. Probable cause cannot be supplied upon the basis of the discovery of contraband or any subsequent admissions. "In law it is good or bad when it starts and does not change character from its success."

—*Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;
Byars v. *United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520;
Carroll v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Wisniewski v. *United States*, (C. C. A. 6) 47 F. 2d 825;
Pearson v. *United States*, (C. C. A. 10) 150 F. 2d 219;
United States v. *O'Connell*, (D. C.) 43 F. 2d 1005;
Henderson v. *United States*, (C. C. A. 4) 12 F. 2d 528;
Nueslein v. *District of Columbia*, (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Di Re*, *supra*;
Johnson v. *United States*, *supra*.

7.

Agents of the Alcohol Tax Unit have no right or authority without warrant, without probable cause, and upon mere suspicion that the automobile is being used for the unlawful transportation of liquor, to pursue and forcibly stop, at random, citizens upon the public highways and to subject the citizen to such inconvenience and indignity upon the chance or for the purpose of discovering in the ve-

hicle liquor to be used as evidence against the citizen or to furnish the basis for a criminal prosecution.

—*Carroll* v. *United States*, 267 U. S. 132; 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Wisneiwski v. *United States*, *supra*;
Pearson v. *United States*, *supra*;
United States v. *O'Connell*, *supra*;
Moring v. *United States*, (C. C. A. 5) 40 F. 2d 267;
Cf. *Carr* v. *United States*, (C. C. A. 2) 59 F. (2d) 991;
United States v. *Hanley*, (C. C. A. 5) 50 F. 2d 465.

8.

The statement of Brinegar relative to his possession of whisky: "Not too much," following the initiation of the unlawful search and after he had been unlawfully arrested and was in the custody of the Federal officers, was not "voluntarily made." There was only a nominal, not a true volition. It was compelled by the circumstances in which he found himself. It is "tinged with official coercion."

—*Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;
United States v. *Baldocci*, (D. C. S. D. Cal.) 42 F. 2d 567;
Ray v. *United States*, (C. C. A. 5) 84 F. 2d 654;
Duncan v. *Commonwealth*, 198 Ky. 841, 250 S. W. 101;
United States v. *Hoffenberg*, (D. C. N. Y.) 24 F. Supp. 989;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
The People v. *Lind*, 370 Ill. 131, 18 N. E. 2d 189;
Graham v. *State*, (Okl. Cr.) 184 P. 2d 984;
Hoppes v. *State*, (Okl. Cr.) 105 P. 2d 433;
Henderson v. *United States*, (C. C. A. 4) 12 F. 2d 528.

9.

Under the Federal rule, a voluntary admission or other evidence obtained while Federal agents are engaged in con-

ducting an illegal search in violation of the Fourth Amendment is inadmissible in evidence on trial of defendant or upon motion to suppress.

—*Nueslein* v. *District of Columbia*, (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Hanley*, (D. C. N. Y.) 50 F. 2d 465;
United States v. *Setaro*, (D. C. Conn.) 37 F. 2d 134;
In re Oryell, (D. C. N. Y.) 28 F. 2d 639;
In re Fried, (C. C. A. 2) 161 F. 2d 453;
Moring v. *United States*, (C. C. A. 5) 40 F. 2d 267;
Worthington v. *United States*, (C. C. A. 6) 166 F. 2d 557;
Cf. *United States* v. *Di Re*, *supra* (as to duty of one illegally arrested to resist or peaceably submit to custody);
Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746;
Gouled v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647;
Amos v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654.

For Oklahoma rule to same effect under constitutional provisions identical to those of the Fourth and Fifth Amendments (Sections 21 and 30, Oklahoma Bill of Rights, Article II, Secs. 21 and 30, Constitution of Oklahoma) see:

Hoppes v. *State*, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
and cases cited *supra* under Point 4.

ARGUMENT.

(1)

No Probable Cause Existed for Search or Arrest Without Warrant.

The undisputed testimony of the Federal Alcohol Tax Unit Agents firmly establishes: That the facts within the knowledge of the officers at the inception of their pursuit of petitioner, at the time of his forcible restraint and arrest, and prior to the time of the making of the alleged incriminating statements were insufficient as basis for and did not constitute probable cause either for a search and seizure without a warrant, or for the arrest of petitioner without a warrant. The record is certain that no offense had been committed in the presence of the officers and there is no suggestion that a felony had been committed of which the officers had reasonable cause to believe petitioner guilty. (R. 7-12) The learned Trial Judge expressly so found (R. 12)[1]; the majority opinion of the Circuit Court of Appeals so holds (R. 38); as does Judge HUXMAN in his dissent. (R. 41)

> "We are of the opinion that the facts within the knowledge of the investigators and of which they had reasonable trustworthy information prior to the time the incriminating statements were made by Brinegar *were not sufficient* to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported in the coupe *and did not constitute*

1. "The witness has already stated there was no appearance in the rear that indicated that the car was heavily loaded. Usually the testimony is that the springs were sagging and so on, but we don't have that in this case."

* * * * * * * * *

"It is my judgment that the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car." (R. 12)

Cf: Pearson v. United States, (C. C. A. 10) 150 F. 2d 219.

*probable cause for a search.** *Neither were such facts sufficient,* in our opinion, to induce an ordinarily prudent and cautious person, under the circumstance, to believe in good faith that Brinegar had committed a felony so as *to constitute probable cause for the investigators arresting Brinegar without a warrant.*** (R. 38-39, 165 F. 2d 512.) (Italics ours.)

In the interest of brevity we shall not repeat the evidence; it is fully set out *supra* under statement of the case. We respectfully adopt the summary of Judge HUXMAN in its entirety.[2] (Note 21, *infra;* R. 41-42.)

Admittedly the officers had no warrant for the arrest of Brinegar, had no search warrant for the search and seizure, and served no warrant upon him. (R. 7, 10)

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* "Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, 220, and cases there cited."

** "Papani v. United States, 9 Cir., 84 F. 2d 160, 163;
Wisniewski v. United States, 6 Cir., 47 F. 2d 825;
Stacey v. Emery, 97 U. S. 642, 645;
United States v. One 1941 Oldsmobile Sedan, 10 Cir., 158 F. 2d 818, 819."

2. The majority opinion holds:

> "In response to further questioning, Brinegar stated that there were about 12 cases of whiskey in the coupe. *Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him.* The officers *then* searched the car. * * *" (R. 37)

It is respectfully submitted that under the authorities the nature of the admission is completely immaterial as *no* admission can *retroactively supply the failure of probable cause* and *no* admission obtained in the course of an illegal search in violation of the Fourth Amendment is admissible in evidence!

(2)

Constitutional Requirements for Search and Seizure.

In the decisions of this Court and of the various Circuit Courts of Appeals the constitutional requirements for search and seizure under the provisions of the Fourth Amendment had been so oft declared that certain propositions were by the Bar considered fundamental:[3]

> That it is imperative that a search and seizure without warrant be made upon "probable cause" *then existing* or it is unreasonable within the meaning of the Fourth Amendment and unlawfully made.[4]
>
> That in establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile to be searched—the *officer is limited to the facts and circumstances within his knowledge with which he initiates the search.* Probable cause cannot be supplied upon the basis of the discovery made or upon subsequently obtained admissions. The discovery of contraband does not in any manner retroactively validate or justify the illegal search.[5]

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3. Generally as to origins, scope, and meaning of the Fourth and Fifth Amendments—"the very essence of constitutional liberty"—see: Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652; Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575; Gouled v. United States, 255 U. S. 302, 41 S. Ct. 261, 65 L. ed. 650; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Nueslein v. District of Columbia, (C. C. A. D. C.) 115 F. 2d 690.

4. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; Pearson v. United States, (C. C. A. 10) 150 F. 2d 219; United States v. One 1937 Model Studebaker Sedan, (C. C. A. 10) 96 F. 2d 104; Johnson v. United States, (No. 329, October Term, 1947) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

5. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; Carroll v. United States, *supra*, note 4; Wisniewski v. United States, (C. C. A.

That agents of the Alcohol Tax Unit *have no right or authority*, without warrant, without probable cause and upon mere suspicion that the automobile is being used for the unlawful transportation of liquor, *to pursue and forcibly stop citizens* upon the public highways and to subject the citizen to such indignity upon the chance of or for the purpose of discovering liquor to be used as evidence against the citizen in a subsequent prosecution.[6]

That under the Federal rule a voluntary admission or other evidence obtained while Federal agents are engaged in conducting an illegal search without a warrant and *without probable cause in violation of the Fourth Amendment is inadmissible* in evidence on trial of the defendant or upon motion to suppress.[7]

(3)

Basic Considerations of the Federal Rule of Inadmissibility.

The opinion of the Circuit Court of Appeals completely disregarded these fundamental precepts and precedents, we

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(Footnote 5, continued:)

6) 47 F. 2d 825; Pearson v. United States, *supra*, note 4; United States v. O'Connell, 43 F. 2d 1005; Nueslein v. District of Columbia, *supra*, note 3; United States v. Di Re, (No. 61, October Term, 1947) 332 U. S. 581, 68 S. Ct, 222, 92 L. ed. 218; Johnson v. United States, *supra*, note 4.

6. Carroll v. United States, *supra*, note 4; Wisniewski v. United States, *supra*, note 4; Pearson v. United States, *supra*, note 4; United States v. O'Connell, *supra*, note 4; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; *Cf*: Carr v. United States, (C. C. A. 2) 59 F. 2d 991; United States v. Hanley, (C. C. A. 5) 50 F. 2d 465.

7. Nueslein v. District of Columbia, (C. C. A. D. C.) 115 F. 2d 690; United States v. Hanley, (D. C. N. Y.) 50 F. 2d 465; United States v. Setaro, (D. C. Conn.) 37 F. 2d 134; In re Oryell, (D. C. N. Y.) 28 F. 2d 639; In re Fried, (C. C. A. 2) 161 F. 2d 453; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; Worthington v. United States, (C. C. A. 6) 166 F. 2d 557; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647; Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746.

submit, and failed to apply the Federal Rule because it failed to appreciate the basic considerations which led to its adoption: Shall the courts of the United States by admitting such evidence approve and encourage illegal action on the part of Federal agents and themselves become accomplices in the willful violation of the constitutional rights of the citizen? Is it more important that all criminals be apprehended and punished even at the expense of the violation of fundamental constitutional rights or is it more important that the courts maintain inviolate and effective the constitutional "guard" even at the expense of permitting some misdemeanants to escape punishment?

We respectfully suggest that the practice approved by the opinion of the Circuit Court of Appeals is the very conduct which originally gave rise to the demand for the constitutional "guard." We further submit that the American people have a feeling of abhorrence and repulsion regarding tactics of law enforcement which the opinion below approves and encourages. Such law enforcement is contrary to the American concept of decent "fair play" and justice. *In re Fried*, (C. C. A. 2) 161 F. 2d 453.

In the famous seditious libel prosecution[8] which in no small measure led to the adoption of the Fourth Amendment, Lord Camden laid it down that "search for evidence" is repugnant to the law. This Court has repeatedly held that the Fourth Amendment embodies this principle.[9]

Two great liberals of this Court, Mr. Justice HOLMES and Mr. Justice BRANDEIS, a score of years ago declared it

8. Entick v. Carrington, 18 How. St. Tr. 1029, 1073, 95 Eng. Rep. 807, —818 (K. B. 1765).

9. Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Gouled v. United States, 255 U. S. 302, 41 S. Ct. 261, 65 L. ed. 650, and cases cited *supra*, note 3.

to be "dirty business" for the Government or its officers to make use of evidence obtained in violation of law; and pointed out that thereby the guaranty of the Fourth Amendment ceases to have meaning or provide protection.

Mr. Chief Justice VINSON in his exhaustive and scholarly opinion in the *Nueslein* case more recently resolved the question in the same manner. His opinion leaves little further to be said. It is incredible that the court below appreciating the tenor of the Constitution and its construction by this Court could have understood the full import of his opinion and rejected its philosophy and holding.[10]

It is the resolve of that principle which Judge HUXMAN voices in his dissenting opinion:

> "I subscribe fully to the philosophy of the *Nueslein* case * * *. Of course, officers should not be unduly restricted in their efforts to enforce the law, *but in no instance are they warranted in violating constitutional immunities in their effort to enforce the law.* Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. *There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment.*" (R. 44) (Italics ours.)

And this Court but yesterday reaffirmed that it does not admit of the desirability or the necessity of permitting officers of the law to violate the basic law—the Constitu-

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10. Mr. Justice HOLMES, dissenting in Olmstead v. United States, 277 U. S. 438, 471, 485; Mr. Justice BRANDEIS dissenting in the *Olmstead* case, *supra*; Nueslein v. District of Columbia, 115 F. 2d. 690.

tion—in order to enforce a statute.[11] Said Mr. Justice JACKSON speaking for this Court:

> "But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

(4)

Circuit Court Opinion Is in Direct Conflict With the *Carroll* Case.

We respectfully submit that the holding and decision of the Circuit Court below is in direct conflict with the rule laid down by this Court in *Carroll* v. *United States*.[12]

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11. United States v. Di Re, *supra*, note 5; Johnson v. United States, *supra*, note 4.

The offense here involved is a misdemeanor. Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223. Petitioner was not a felon. He had never before been convicted of any crime. He was allegedly transporting U. S. tax-paid liquor from Missouri into Oklahoma. He was lawfully upon the public highway. By the admission of the officers they did not see defendant commit any violation of law which would have warranted them in arresting him without a warrant. They had no probable cause for their original pursuit. This certainly is not an "important" crime. There was no great public policy involved either in the transgression or in the enforcement. The law which was violated is not of real import—*it is no longer law today!* The Liquor Enforcement Act of 1936 under which this prosecution was had became inoperative as to Oklahoma by repeal of the Oklahoma "Permit Law" (37 Okla. Stats. Ann., Secs. 41-48, incl.) through enactment of Enrolled House Bill No. 254, effective April 24, 1947. There is presently no Federal law prohibiting the transportation of tax-paid whisky into the State of Oklahoma. Von Patzoll v. United States, (C. C. A. 10) 163 F. 2d 216, *certiorari* denied. The same governmental agency which seeks here so strongly to convict by means which we believe in violation of constitutional rights today suffers unlimited transportation of the same nature. The defendant here received a fine of $100.00 and a sentence of 30 days. Inflicting this punishment upon petitioner will serve as no deterrent to others and will uphold no existing law.

12. 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790:

In the *Di Re* case this Court called attention to the limitations

Under the Circuit Court of Appeals opinion Federal agents may now pursue and forcibly stop, for the purpose of search and the discovery of evidence of violation of law, whomsoever they may please, *indiscriminately, at random and without probable cause* and if through ignorance, chance, skillful interrogation or through the force and compulsion inherent in the attending circumstances the officers are able to obtain sufficient incriminating admissions they then have legitimatized their illegal enterprise, admittedly undertaken in affront to the law and in violation of the Constitution, and have clothed it with the sanctity of "probable cause"—thereby not only validating the search but

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(Footnote 12, continued:)
of the *Carroll* case: " • • • the *Carroll* decision falls short of establishing a doctrine that, without such legislation (the Prohibition Act) automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes." It intimated that the doctrine of the *Carroll* case might properly be restricted to those cases where Congress has expressly enacted a statute providing that a search without warrant under particular circumstances is reasonable. We are of the opinion that the *Carroll* case should properly be so restricted. We are not impressed that an automobile should be any more vulnerable to search without warrant than a person or fixed premises in the absence of legislation expressly so providing. There is no more justification to search an automobile because of cause to believe it contains contraband than to search fixed premises because of cause to believe it contains contraband. The law as to search should be no broader than the law as to arrest: for an offense committed in the presence of the arresting officer or for a felony of which the officer has reasonable cause to believe the defendant guilty. Experience has taught us that under any other rule—and this case is an example—officers are in fact encouraged to and do as a matter of practice stop and search on mere suspicion for the purpose of procuring evidence of law violation. It was primarily to prevent this very type of intrusion that the Fourth Amendment was demanded of the Government by the people.

However, we need not in this case overrule the *Carroll* case. Admitting for the purpose of this argument that the *Carroll* case is controlling, the opinion of the court below is in direct conflict with the rule therein pronounced.

making admissible in evidence against the citizen, both the statements and the evidence so obtained.

This Court, on the contrary, has *consistently* held that a search and seizure without warrant must be made upon probable cause *existing at the inception of the search* or it is unreasonable within the meaning of the Fourth Amendment.[13] The cases *do not* admit of any "retroactive effect" of after-acquired knowledge or information which may be added to admittedly insufficient knowledge so as to supply probable cause which was lacking in the original pursuit, arrest or intrusion.[14]

> "An officer gaining access to private living quarters under color of his office and of the law which he personifies *must then* have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." (Italics ours.)
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> *Johnson* v. *United States*, 333 U. S. 10.

To affirm the rule laid down by the Circuit Court of Appeals opinion is to make meaningless the rule of "probable cause." It opens wide the door to the most grave

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13. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543; Pearson v. United States, (C. C. A. 10) 150 F. 2d 219; Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323; United States v. Di Re, *supra*, note 5; United States v. One 1937 Model Studebaker Sedan, (C. C. A. 10) 96 F. 2d 104.

14. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; Carroll v. United States, *supra*, note 13; Wisniewski v. United States, *supra*, note 6; Pearson v. United States, *supra*, note 13; United States v. O'Connell, 43 F. 2d 1005; Nueslein v. District of Columbia, *supra*, note 10; United States v. Di Re, *supra*, note 5; Johnson v. United States, *supra*, note 13.

abuses. It encourages exploratory searches. If the constitutional guarantee is to have any real meaning it must continue to be the rule, as this Court has always insisted it is, that in establishing "probable cause" for search without a warrant *the officer is necessarily limited to the facts and circumstances within his knowledge with which he initiates the search and that "probable cause" cannot be established upon the basis of subsequently discovered information by way of admission, or the discovery of contraband itself.*[15]

In the *Carroll* case, Chief Justice TAFT, speaking for this Court, lays down the test:

> "* * * we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. * * * But those lawfully within the country, entitled to use the public highways, have a right to free passage *without interruption or search unless there is known to a competent official authorized to search, probable cause* for believing that their vehicles are carrying contraband or illegal merchandise.
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> * * * * * * * * *
>
> *"The measure of legality* of such a seizure is, therefore, that the seizing officer *shall have reasonable or probable cause for believing that the automobile which he stops and seizes had contraband liquor therein which is being illegally transported."* (Italics ours.)[16]

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15. Cases cited, *supra*, notes 13 and 14.

16. We respectfully suggest that the opinion below is also in direct conflict with the decision of the Fifth Circuit Court of Appeals in Moring v. United States, 40 F. 2d 267:

> "Those officers were on the highway near Falfurias, Tex., 75 or 100 miles from the Mexican border, when they saw two automobiles which they caused to stop by placing in the center of the highway a large sign upon which was printed, 'Stop, U. S.

(5)

Circuit Court Opinion Is in Conflict With the *Nueslein, Hanley* and *Johnson* Cases as to What Constitutes "Search."

We respectfully submit that the holding of the Circuit Court is in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in *Nueslein* v. *District of Columbia*, 115 F. 2d 690, the decision in *United States* v. *Hanley*, 50 F. 2d 465, and the decision of this Court in *Johnson* v. *United States*, 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

The court in its opinion holds that *the search* did not commence until *after* the pursuit of petitioner was had and completed, his car was forcibly stopped and run into the ditch, the interrogatories propounded, and the admissions

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(Footnote 16, continued:)

Officers.' Appellant was the owner of both automobiles. He was riding in the one in the front, and the one in the rear was being driven by another under his direction. Search was made without appellant's consent, and the liquor that was seized was found in the automobile in which he was not riding.

"The officer had no reasonable cause to believe or suspect that either of the automobiles contained liquor, but stopped them to see whether they did or not. Under these circumstances we are of opinion *that they were without authority of law to stop or search* the automobiles, and that it was error to base a conviction upon evidence seized upon such search." (Emphasis ours.)

We believe that in the *Carroll* case and numerous other decisions this Court has clearly said to the lower courts and to the law enforcement officers: "Agents of the Alcohol Tax Unit have no right or authority in law without warrant and without probable cause, no matter how strong their suspicion, to stop citizens upon the highway for the purpose of searching the vehicle for contraband or evidence of violation of law." Yet it appears that the voice of the Court has not been heard or at least not understood. *It is in the original pursuit and stopping that lies the basic illegality.* Carroll v. United States, *supra*, note 13; Wisniewski v. United States, *supra*, note 5; Pearson v. United States, *supra*, note 5. *Cf*: Carr v. United States, (C. C. A. 2) 59 F. 2d 991; United States v. Hanley, (C. C. A. 5) 50 F. 2d 465.

obtained; that *then* or at some time thereafter the search was commenced. (R. 37)[17]

Both as a matter of fact, and as a matter of law, this is basic error! It begs of no genuine dispute that when the officers commenced their chase their "chief object"—their single purpose and intent was to search that car! *The search began when they commenced the pursuit.*[18] This is the crux of the matter. The force, compulsion and coercion attending the surrounding circumstances was continuing throughout. The statement of Brinegar relative to his possession of whiskey: "Not too much," subsequent to the initiation of an unlawful search, after he had been unlawfully arrested[19]

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17. The record is replete that the "search began when they (the officers) commenced the pursuit." Such was the position of the Government, both in the trial court and before the Circuit Court of Appeals. (R. 7-11, 21, 23-26, and statement by Government's attorney, R. 12-13). "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant." (Per HUXMAN, dissenting opinion, R. 42.) This was the position of the Government on application to this Court for writ of certiorari. ("* * * *non constat* the holding below, it seems clear that the officers in the present case had reasonable cause to stop petitioner's car." Brief of United States in opposition, p. 5.) Such an erroneous conclusion of fact is basic to the error here involved. We do not admit that there exist *two* rules of probable cause: (1) probable cause to *stop* petitioner's car, and (2) probable cause to *search* petitioner's car. *The search commences with the pursuit; the stopping of the car is incident to the search. Cf:* Henderson v. United States, 12 F. 2d 528; Hoppes v. State, (Okl. Cr.) 105 P. 2d 433.

18. Nueslein v. District of Columbia, 115 F. 2d 690; United States v. Hanley, (D. C. N. Y.) 50 F. 2d 465. ("The facts in this case are indistinguishable in principle from those in these two cases." HUXMAN, J., dissenting opinion, R. 42.) Johnson v. United States, *supra*, note 4; Edwards v. State, (Okl. Cr.) 177 P. 2d 143; Black v. State, 63 Okl. Cr. 317, 74 P. 2d 1172; Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433; Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621.

19. See authorities note 23. This is the law of Oklahoma.

and was in the custody of the Federal Officers was not "voluntarily made." There was no true volition; it was compelled by the circumstances in which he found himself, and is tinged with official coercion.[20] The law does not require a citizen in such position to *resist arrest*, to engage in public in a futile contest with the police as to its legality, or refuse to be co-operative; even submissive. It does not require a misdemeanant brazenly to lie to the officer. It is right and proper that upon being taken into custody he recognize the authority of the lawfully appointed agents of his Government:

> "It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case."
>
> —*United States* v. *Di Re, supra.*

Under the authority of the *Johnson, Nueslein* and *Hanley* cases, as a matter of fact,[21] *these acts constituted a*

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20. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; United States v. Baldocci, (D. C. S. D. Cal.) 42 F. 2d 567; Ray v. United States, (C. C. A. 5) 84 F. 2d 654; Duncan v. Commonwealth, 198 Ky. 841, 250 S. W. 101; United States v. Hoffenberg, (D. C. N. Y.) 24 F. Supp. 989; Edwards v. State (Okl. Cr.) 177 P. 2d 144; The People v. Lind, 370 Ill. 131, 18 N. E. 2d 189; Graham v. State, (Okl. Cr.) 184 P. 2d 984; Hoppes v. State, (Okl. Cr.) 105 P. 2d 433. *Cf.* Henderson v. United States, (C. C. A. 4) 12 F. 2d 528.

21. "By admission of the agents themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant. * * * What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. *Ascertaining this constituted a search.* Is there anyone so naive as to believe that if he had answered that he had no whisky that they would have apologized, begged his pardon

search! A search admittedly *illegal* because found by both the trial court and the Circuit Court of Appeals to be wholly without probable cause.

> "Entry to defendant's living quarters, *which was the beginning of the search*, was demanded under color of office." (Italics ours.)
>
> *Johnson* v. *United States, supra.*

(6)

Circuit Court Opinion in Conflict With *Di Re* and *Johnson* Cases as to Law of "Arrest."

We respectfully submit that the holding of the Circuit Court of Appeals as to the matter of "arrest" is in direct conflict with the decisions of this Court in the *Di Re* and *Johnson* cases.[22]

There can no longer be any question but that in the absence of an applicable Federal statute the law of the state where an arrest without warrant takes place determines its existence and validity. Under the law of Oklahoma it is well settled that when the officers gave chase and pursued Brinegar for a distance of a mile or a mile and a quarter, opened up their siren, "forced him off the road" and into the ditch, without probable cause and absent an offense hav-

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(Footnote 21, continued:)

for having violated his constitutional rights as well as their oath of office to respect the Constitution, and permitted him to proceed? That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and *the search was on when the chase began* and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax Unit agents were concerned." (R. 41-42) (Emphasis ours.)

22. 332 U. S. 581; 333 U. S. 10.

ing been committed in the presence of the officers, Brinegar was under an unlawful arrest.[23] *Hoppes* v. *State*, 70 Okl.

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23. Under the law of Oklahoma a citizen's car may not be stopped on suspicion and his person or car searched in order to procure evidence against him. A search or arrest without a warrant can be valid only if for an offense committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe the defendant guilty. Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433; Ingraham v. State, 48 Okl. Cr. 178, 290 P. 344; Graham v. State, (Okl. Cr.) 184 P. 2d 984; Childress v. State, 31 Okl. Cr. 208, 238 P. 218; Leary v. State, (Okl. Cr.) 67 P. 2d 972; Edwards v. State, (Okl. Cr.) 177 P. 2d 143; Keith v. State, 30 Okl. Cr. 168, 235 P. 631; Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621; Ketcham v. State, 63 Okl. Cr. 428, 75 P. 2d 1159; Tucker v. State, 62 Okl. Cr. 406, 71 P. 2d 1092; Browdry v. State, 64 Okl. Cr. 86, 77 P. 2d 753; Black v. State, 63 Okl. Cr. 317, 74 P. 2d 1172. The fact that defendant was conveying liquor, not being discoverable without a search, the offense of conveying was not committed in the presence of the officers. Sowards v. State, 27 Okl. Cr. 431, 259 P. 157; Leary v. State, (Okl. Cr.) 67 P. 2d 972, and cases cited *supra*.

The following propositions, it is respectfully submitted, are clearly settled by statute and decision as the law of the state:

Where officers pursue an automobile on the highway, sound their siren as a result of which the driver stops his car and submits to the restraint of the officers an arrest is then and there consummated.

Where officers pursue an automobile lawfully on the highway, compel the driver to stop his car by forcing him off the road, place him in restraint and prevent the further progress of his car an arrest is then and there consummated.

Where such an arrest without warrant is made without probable cause or the commission of any offense in the presence of the officer the arrest is unlawful and a search incident or subsequent thereto is unreasonable and illegal.

Where the officer becomes aware of the facts constituting the offense *after* making an unlawful arrest the arrest cannot be justified as being for an offense committed in his presence.

Voluntary statements or admissions, if any, made by the defendant following such an unlawful arrest are incompetent and inadmissible on a motion to suppress the evidence.

The search commenced with the pursuit and the illegal search and pursuit cannot be legalized or justified by any subsequent admission, waiver, commission of an offense or the discovery of the contraband.

Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. State, (Okl. Cr.) 177 P. 2d 143;

Cr. 179, 105 P. 2d 433; *Evans* v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621.

Although the Oklahoma law requires the commission of an offense in the presence of the officer as justification for search without a warrant, while under the Federal rule as laid down in the *Carroll* case only "probable cause" is required, the absence of either probable cause or the commission of an offense in the presence of the A. T. U. agents makes the Oklahoma decision of *Hoppes* v. *State* a case in point. The conclusion obtained by the Criminal Court of Appeals of Oklahoma is in accord with the decisions of this Court and particularly the *Johnson* case. There as here there was a pursuit, a stopping and investigation. There as here there was obtained a purported voluntary statement by the defendant as to the presence of intoxicating liquor in her car. We quote at length:

"Counsel for the state in their brief argue that it

(Footnote 23: continued:)

Bohannon v. State, 66 Okl. Cr. 190, 90 P. 2d 675;
Hamner v. State, 44 Okl. Cr. 249, 280 P. 475;
Ingraham v. State, 48 Okl. Cr. 178, 290 P. 344.

"*Arrest Defined.* Arrest is the taking of a person into custody, that he may be held to answer for a public offense."

22 Okla. Stats. Ann., Sec. 186; Sec. 186, Code of Criminal Procedure.

"*Arrest, How Made.* An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."

22 Okla. Stats. Ann., Sec. 190; Sec. 190, Code of Criminal Procedure.

"*Arrest Without Warrant by Officer.* A peace officer may, without a warrant, arrest a person: 1. For a public offense, committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested."

22 Okla. Stats. Ann., Sec. 196; Sec. 196, Code of Criminal Procedure.

makes no difference whether an attempt to search began or a search began before the defendant's car was stopped, because when the officers went to the side of the car, *before any actual search, or before any arrest was made, the defendant told* deputy sheriff, Porter, she had a load of liquor and was trying to get away with it, there had been no arrest up to that time. And if the officers had acted illegally in pursuing her, then the illegal acts of the officers may be separated from their legal acts, and they had the right, after being informed by the defendant that the offense was being committed by the defendant, to look into the car and see the whisky, and arrested the defendant.

"It is also urged that the statement of the defendant was equivalent to the officers seeing the offense committed in their presence, therefore it makes no difference whether under the theory of the law the search had been begun before the officers stopped the defendant's car.

"With this contention we cannot agree. *In our opinion it is immaterial whether or not any verbal admission was made by the defendant following her arrest,* if in fact the defendant was not committing an offense in the presence of the officers before she was arrested. (In this case—lack of probable cause.) *If the arrest was unlawful any verbal admission, if any, made by the defendant following such arrest, was incompetent and inadmissible on a motion to suppress the evidence.* (Parenthetical insert ours.)

* * * * * * *

"*When the officers started in pursuit, they began an effort to search,* and tested by the above statutory provisions (see note 23) *when the officers sounded the siren, and defendant stopped her car and submitted to the custody of the officers, the arrest was then and there consummated.* The search that followed was an incident thereto.

"It necessarily follows from the foregoing review that upon the admitted and undisputed facts, the arrest of the defendant was unlawful, the search was therefore unreasonable." (Italics ours.)

(7)

The Circuit Court Opinion Is in Conflict With the *Nueslein* Case and the Federal Rule of Admissibility.

By a reasoning which we submit to be specious and which, as above pointed out, overlooks the basic considerations involved, the Circuit Court held that notwithstanding the absence of probable cause for search at the inception of the chase, the subsequent "voluntary admission" of Brinegar, made after being unlawfully stopped and arrested, related back and could be added to the insufficient knowledge previously had by the Federal agents so as to supply probable cause for the search and seizure, and that the admissions and evidence secured by such search are admissible in evidence against the defendant.[24]

It is impossible to reconcile the opinion below with the decision of the Circuit Court of Appeals in *Nueslein* v. *District of Columbia,* 115 F. 2d 690, the decision in *United States* v. *Hanley,* 50 F. 2d 465, and the opinion of this Court in the *Johnson* case.

The *Nueslein* opinion, it is respectfully submitted, flatly holds that the evidence obtained through a *voluntary* declaration of fact by officers engaged in a search without probable cause and in violation of the Fourth Amendment is inadmissible in evidence as against a defendant in a criminal

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24. We respectfully submit that the opinion in the *Johnson* case clearly refutes the proposition that Federal officers by virtue of illegal action may subsequently and by virtue thereof obtain sufficient information so as to provide probable cause and thereby legalize or justify the original illegality.

prosecution. In that opinion Mr. Chief Justice VINSON exhaustively reviews the historical background, the conflict existing between the common law, certain state decisions, and the Federal rule, the scope, meaning and purpose of the Fourth and Fifth Amendments and the fundamental policy which had determined the Federal rule of exclusion. In our opinion Mr. Chief Justice VINSON in the *Nueslein* case has declared basic constitutional policy. It is the rule envisaged by the decisions of this Court.[25] It is the well established Federal rule.[26]

We respectfully join with Judge HUXMAN in subscribing to the philosophy of the *Nueslein* case[27] and urge upon this Court its declaration as to the rule prevailing in *all* the Courts of the United States.

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25. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Gouled v. United States, 225 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647; Johnson v. United States, *supra;* Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652.

26. Nueslein v. District of Columbia, *supra;* U. S. v. Hanley, *supra;* U. S. v. Setaro, (D. C. Conn.) 37 F. 2d 134; In re Oryell, (D. C. N. Y.) 28 F. 2d 639; In re Fried, (C. C. A. 2) 161 F. 2d 453; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; Worthington v. United States, (C. C. A. 6) 166 F. 2d 557. ("The Fourth Amendment does not exclude from its protection a woman of the underworld. Police officers can no more violate her rights under the Constitution than they can violate those of any other person. We have heard enough in these last years, throughout the world, of the knock on the door in the nighttime, the arrest, the ransacking search, and the prison cell, to take warning. The constitutional rights of everyone are immediately imperiled when the rights, of even the outcast, the disdained, and the powerless, are trampled over with impunity. Violation of the safeguards, guaranteed by the Bill of Rights, is not to be trifled with, or lightly considered, no matter who the victim be. Such abuse must be struck down, without palliation, in its beginning.") It is also the Oklahoma rule. Hoppes v. State, *supra.*

27. As the sole authority for its conclusion to the contrary the opinion of the Circuit Court of Appeals cites its own decision in Morgan v. United States, 159 F. 2d 85. By *a fortiori* reasoning, if the decision

We respectfully pray the order of this Court reversing and remanding this cause to the District Court for the Northern District of Oklahoma with directions to sustain the motion to suppress; or in the alternative an order to the Circuit Court of Appeals for the Tenth Circuit to issue its mandate to the District Court consistent with the opinion of this Court.

Respectfully submitted,

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(Footnote 27, continued)

in this case is wrong and the *Morgan* case is to the same effect, then the *Morgan* case is also erroneously determined. However, we respectfully point out to the Court that the *Morgan case is no authority* and does not involve the question here presented. The point was neither presented to nor determined by the court in that case. The opinion on its face discloses that the judgment of the lower court was there reversed *solely* on the ground that the motion for directed verdict as to Count 2 should have been sustained. *The jury had acquitted appellant of the charge under Count 1.* Under well established rules of construction, that part of the opinion relating to "arrest" not being determinative nor necessary to the holding or decision is *dicta.* Additionally, it is submitted that it is in conflict with and is overruled by the subsequent opinions of this Court in the *Di Re* and *Johnson* cases. The opinion in the *Morgan* case was written for the Court by Judge HUXMAN. Certainly he is in position to state the matter then before the Court and which was by the *Morgan* opinion determined. In his well reasoned dissent in this case Judge HUXMAN says:

> "The facts in the *Morgan* case are not nearly as strong on the question of pursuit as they are in this case. But in any event *this precise point was not raised or decided in that case.* * * * The *Morgan* case is not authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible." (Italics ours.) (R. 43)